IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hanif v. TJM Management Consultants Ltd.,* 2011 BCSC 521

Date: 20110427
Docket: S97278
Registry: New Westminster

Between:

Mohammed Hanif

Plaintiff

And

TJM Management Consultants Ltd.

Defendant

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff:	R.L.J. Van Der Mark
Counsel for the Defendant:	G.E. Edwards
Place and Date of Hearing:	New Westminster, B.C. April 7 and 8, 2011
Place and Date of Judgment:	New Westminster, B.C. April 27, 2011

INTRODUCTION

[1] This is an application for summary dismissal brought by the defendant in respect of the plaintiff's claim for specific performance or, alternatively, damages for the defendant's wrongful repudiation of an agreement for the sale of two strata units located in Surrey, B.C. The two strata units are warehouse spaces and will be referred to as "Unit 109 and Unit 110". Although the defendant originally sought summary judgment in regard to his counterclaim for damages, the parties agreed that this part of the application should be adjourned generally.

[2] The issues in dispute are relatively straightforward. They concern the enforceability of an alleged agreement for the sale of Unit 109 and Unit 110 and the validity of the assignment of the purchaser's interest in the agreement to the plaintiff. However, a determination of these issues is rendered far more complex for a number of reasons. First, the agreement for the sale of Unit 109 and Unit 110 was entered into in or about February 2001 and the conduct of the parties since that date is relevant to the validity of the agreement. Second, the plaintiff purported to take an assignment of the purchaser's interest in the agreement in or about January 2001 and his action to enforce the agreement to sell Unit 109 and Unit 110 was dismissed by Preston J. on February 10, 2006. Third, the plaintiff purported to enter into a new assignment agreement and commenced this action to enforce the contract regarding the sale of Unit 109 and Unit 110.

[3] To properly address the issues in dispute, I intend to outline a chronology of events leading to this application for summary judgment. I will then address each of the issues raised by the parties concerning the validity of assignment and the enforceability of the contract for the sale of Unit 109 and Unit 110.

CHRONOLOGY OF EVENTS

[4] In July 2000, Suleman Abbas, operating under the name of Fleetwood Automotive Ltd., rented Unit 109 and Unit 110 from the defendant through its principal officer, Theo Boere. At that time, the rent for the units was $1,800 per

month. In or about January 2001, Mr. Boere and Mr. Abbas began negotiating for the purchase of the two units and their discussions led to an understanding with regard to the terms of an agreement for sale. On January 31, 2001, Mr. Boere faxed to Mr. Abbas the terms of the agreement he was prepared to sign. Mr. Abbas attempted to negotiate a variation of these terms; however, these parties ultimately signed the terms drafted by Mr. Boere on February 20, 2001.

[5] The terms of this agreement, which will be referred to as "the Purchase and Sale Agreement", were as follows:

> As per our discussion yesterday, I am confirming that you and/or Fleetwood Automotive Ltd. will be buying the warehouse units 109 and 110 for $210,000. ... The mortgage with the Business Development Bank of Canada was $133,950 as of January 25, 2001. This sale will be in the form of an agreement for sale.
>
> The conditions attached to this sale are:
>
> 1 - Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. will pay $1,800.00 per month due on the first of each month to cover the existing mortgage and property taxes. The first payment is due by February 1, 2001, and shall be deposited directly to the account of TJM Management Consultants Ltd. at the TD Bank in Guildford. Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. shall forward 12 postdated cheques to TJM Management Consultants Ltd. for the remainder of the year and shall forward future postdated cheques at least 30 days before the expiry of the last postdated cheques previously forwarded. As the existing mortgage is on a floating rate there may be adjustments to the current monthly payment should interest rates rise. This payment shall be considered to be a monthly mortgage payment. Any GST which is payable or may become payable will be the sole responsibility of Mr. Suleman Abbas and/or Fleetwood Automotive Ltd.
>
> 2 - Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. will pay the strata corporation the monthly strata fees of $60.00 per unit and any other fees which the strata corporation deems payable on the two units. The strata fees are payable as of January 1, 2001. Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. acknowledge that they have been using the units since the beginning of July, 2000, and as such are responsible for any fees, charges, repair costs, maintenance fees, and/or any other fees related to those units since the beginning of July 2000. Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. are also responsible for hydro, electric and gas charges, and telephone charges for that period.
>
> 3 - Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. agree to pay for the current equity in the two units which amounts to $76,050. Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. agree to pay $2,000 a month in equity reduction and $700 a month in interest payments. This payment is based on a 12% annual interest rate and payments will be adjusted on an

> annual basis. A blended payment of $2,700 is due on the tenth of each month (first payment is due February 10, 2001) and Mr. Suleman Abbas and/or Fleetwood Automotive Ltd. will forward 12 postdated cheques to TJM Management Consultants Ltd. for the remainder of the year and shall forward future postdated cheques at least 30 days before the expiry of the last postdated cheques previously forwarded. Any GST which is payable or may become payable will be the sole responsibility of Mr. Suleman Abbas and/or Fleetwood Automotive Ltd.
>
> 4 - Any late payments on either the monthly mortgage payment or equity reduction or interest payments will incur interest charges of 2% per month. Any payments which are received after 10 business days from the due date shall render this agreement null and void.
>
> All costs associated with setting up this agreement for sale to be paid for by the purchaser.
>
> This agreement is a temporary agreement to be replaced by a formalized agreement in the future.

[6] On February 1, 2001, Mr. Abbas signed an agreement that purported to assign his interest in the Purchase and Sale Agreement to Mr. Hanif, the plaintiff in this action. While this agreement was never shown to Mr. Boere, it is apparent that he knew that there was some arrangement between Mr. Hanif and Mr. Abbas with regard to Unit 109 and Unit 110.

[7] Pursuant to the Purchase and Sale Agreement, Mr. Abbas and Mr. Hanif paid the monthly equity payments and the interest payments in addition to the $1,800 per month considered to be mortgage payments under clause 1 of the Purchase and Sale Agreement. Although Mr. Boere maintains he had no knowledge of who paid these monies, at para. 6 of his affidavit dated November 14, 2005, he acknowledges that it was Mr. Hanif who paid the equity instalments and the interest payments of $2,700 per month up until August 2004.

[8] While there were numerous telephone and in person discussions between Mr. Boere and Mr. Abbas in regard to late payments and non-payment of strata fees, Mr. Boere did not exercise his right under the Purchase and Sale Agreement to terminate between February 2001 and January 2003. Further, Mr. Boere deposed that he approached Mr. Abbas on several occasions during this period to arrange for the completion of the purchase; however, Mr. Abbas inevitably wanted to postpone

completion. Mr. Boere did not take steps to terminate the Purchase and Sale Agreement based on Mr. Abbas' failure to take steps to complete the purchase of the units.

[9] On January 17, 2003, Mr. Schwarz, counsel for Mr. Hanif, wrote to Mr. Boere and advised him that the unregistered agreement for sale between TJM Management Consultants Ltd. and Fleetwood Automotive Ltd. had been assigned to Mr. Hanif. Mr. Schwarz requested a copy of the Purchase and Sale Agreement and a statement of the balance owing under it as of January 20, 2003, with a per diem interest rate thereafter. Mr. Boere responded to this letter in writing on January 23, 2003. He did not express any surprise concerning the assignment and provided the information requested. He stated that the balance owing on the purchase as of January 23, 2003, was $37,500 and that the mortgage as of this date was $124,500. In addition, Mr. Boere expressed concern about the late payments by Fleetwood Automotive Ltd. during 2002 and the arrears of strata fees. Lastly, Mr. Boere stated, "Please note also that Fleetwood Automotive Ltd. is required to maintain payments on a timely basis until such time as any sale of the properties is completed".

[10] Mr. Boere did not receive further correspondence from Mr. Schwarz in regard to the completion of the purchase; however, there is no evidence that Mr. Boere provided Mr. Schwarz with contact information regarding his conveyance solicitor. Nor is there any evidence that Mr. Boere took steps to terminate the Purchase and Sale Agreement for failure to complete the purchase at this time.

[11] Between January and May 2003, Mr. Boere continued to complain about the late payments and the arrears of strata fees; however, he took no steps to terminate the contract. On May 23, 2003, Mr. Boere received a letter from Mr. Gellert who purported to act on behalf of Mr. Hanif in regard to the purchase of Unit 109 and Unit 110. Mr. Gellert advised Mr. Boere that his client was the assignee of Fleetwood Automotive Ltd. as purchaser under the agreement for sale. He also confirmed their earlier conversation in which Mr. Boere agreed that notwithstanding the defaults by the purchaser, he was willing to complete the sale. Again, Mr. Gellert asked for a

copy of the Purchase and Sale Agreement. Although this letter is extremely inaccurate, it refers to the units as being in Nanaimo and to Mr. Hanif as “Janif”, it is apparent that Mr. Boere had little difficulty discerning what the letter was in reference to. On May 23, 2003, Mr. Boere replied to Mr. Geller’s letter; he provided the legal description of the properties along with a statement describing the monies owing under the agreement. In the attachment, Mr. Boere states that the payments on equity to date are $56,000; the mortgage balance as of May 23, 2003, was $121,500; and the outstanding equity was $32,500. Mr. Boere did not dispute Mr. Geller’s statement that he had agreed to complete despite the defaults under the Purchase and Sale Agreement.

[12] No further progress was made with respect to the completion of the sale after May 23, 2003. Mr. Boere sent another payout statement to Mr. Abbas on July 23, 2003, indicating that the outstanding equity was at this time $53,650. There appears to be no further correspondence between the parties; however, Mr. Boere deposes that Mr. Abbas complained that he was having cash flow problems at that time and could not complete the purchase.

[13] In or about August 2004, Mr. Hanif stopped making the equity payments pursuant to the Purchase and Sale Agreement. It was his belief that he had already paid more than what was required under the agreement and Mr. Boere had failed to provide him with an accounting of the mortgage payments and the balance owing at that date. While it is not entirely clear from the affidavit material filed in this proceeding, it appears that Mr. Hanif took the view that Mr. Boere had repudiated the Purchase and Sale Agreement and he commenced an action against TJM Management Consultants Ltd. for specific performance in October 2004.

[14] Mr. Boere deposed that he had no idea that Mr. Hanif had been assigned the Purchase and Sale Agreement or had instituted legal proceedings until he sought to refinance the mortgage registered against Unit 109 and Unit 110 in the fall of 2004. Mr. Boere had his own cash flow problems at this time. He obtained an appraisal for Unit 109 and Unit 110 for the purpose of refinancing the mortgage held by the

Business Development Bank. When he approached the bank, Mr. Boere was advised that Mr. Hanif had registered a certificate of pending litigation (CPL) against Unit 109 and Unit 110. The documents registered in the Land Title office indicated that Mr. Hanif had commenced an action for specific performance of the contract for the sale of Unit 109 and Unit 110 against TJM Management Consultants Ltd. as an assignee of the purchaser's interest in the New Westminster Registry under Action No. S88972 on October 27, 2004. When Mr. Boere examined the agreement attached to the assignment, he immediately realized that this was not the Purchase and Sale Agreement he had signed. The CPL prevented Mr. Boere from remortgaging the units.

[15] Mr. Boere filed a defence to the action and began to negotiate a resolution with Mr. Hanif. Over the next year, Mr. Boere met with Mr. Hanif on four occasions in an effort to resolve their dispute. Several options with regard to the purchase of the units were discussed. Both parties have entered into evidence a without prejudice letter from Mr. Boere to Mr. Hanif dated December 19, 2004, that proposes two options for settling the dispute, neither of which is consistent with the terms of the Purchase and Sale Agreement. Both options contemplate additional payments by Mr. Hanif to reflect the current value of the units, which were appraised at $300,000. One option contemplated an assumption of a larger mortgage and the other option envisioned the purchase of shares in TJM Management Consultants Ltd. along with a refinanced mortgage of $210,000. Settlement negotiations continued until June 2005, at which time Mr. Boere took the position that their discussions were at an end.

[16] While the parties have different recollections of the words spoken and actions taken during this period of settlement negotiations, it is apparent that they did not reach a resolution of the dispute. On February 10, 2006, Mr. Boere brought on an application for summary dismissal of Mr. Hanif's action for specific performance under Action No. S88972. Mr. Boere argued that Mr. Hanif did not have standing to commence the action because the assignment agreement purported to assign a fraudulent purchase and sale agreement. Mr. Justice Preston found that the contract

that was the subject of the assignment was not the document containing the agreement between TJM Management Consultants Ltd. and Mr. Abbas. In the end, Preston J. dismissed Mr. Hanif's action. The grounds for dismissal are set out in para. 7 of the judgment as follows:

> I am satisfied that, on the evidence before me on this Rule 18A application, the only conclusion I can come to is that the plaintiff does not have a valid assignment of the contract entered into between the defendant and Mr. Abbas and Fleetwood Automotive. Accordingly, he has no standing to bring the action claiming an interest in the property.

[17] The CPL registered against Unit 109 and Unit 110 was set aside and the plaintiff's action was dismissed with costs. Mr. Hanif did not appeal this judgment. Instead, he immediately purported to enter into another assignment of the Purchase and Sale Agreement with Mr. Abbas. The second assignment, hereafter referred to as Assignment No. 2, is dated February 16, 2006. It purports to be signed by Mr. Abbas on behalf of himself and Fleetwood Automotive Ltd. The witness to his signature is identified as Shamgen Kahn. The Assignment No. 2 sets out the name of the vendor as TJM Management Consultants Ltd.; the name of the purchaser as Mr. Suleman Abbas and/or Fleetwood Automotive Ltd.; the name of the assignee as Mohammed Hanif; and provides a legal description of Unit 109 and Unit 110. The terms of the agreement are as follows:

Whereas:

> A. The Vendor and the Purchaser entered into a Contract of Purchase and Sale on January 31, 2001 (the "Contract") for the sale and purchase of the aforesaid lands and premises.
>
> B. The Purchaser wishes to assign his interest in and to the said Contract to the Assignee.
>
> NOW THEREFORE IN CONSIDERATION OF the sum of One Dollar ($1.00) and other valuable consideration paid by the Assignee to the Purchaser, the Purchaser hereby assigns all its interest in and to the Contract to the Assignee.

[18] On February 20, 2006, Mr. Hanif commenced the within action for specific performance in precisely the same terms as Action No. S88972; however, the date of the assignment was changed to February 16, 2006 to reflect Assignment No. 2.

Mr. Boere filed a general denial of the claim on March 20, 2006 and did not file an amended statement of defence until April 3, 2008. Mr. Hanif did not take any steps to advance the proceedings prior to this date. Thereafter it was Mr. Boere who brought on an application to dismiss the action based on a number of grounds, including *res judicata.*

[19] Gerow J. granted Mr. Boere's application on April 8, 2008 and her reasons for decision are recorded at *Hanif v. TJM Management Consultants Ltd.*, 2008 BCSC 877. Madam Justice Gerow concluded that the validity of the assignment was *res judicata* and held that Mr. Hanif was therefore estopped from bringing his claim. Mr. Hanif appealed this judgment and the Court of Appeal reversed the ruling of the trial judge on October 9, 2009: *Hanif v. TJM Management Consultants Ltd.*, 2009 BCCA 445. The Court of Appeal held that because there was now a new assignment to consider, the substantive issues in dispute were not *res judicata.* As Saunders J.A. says at para. 12:

> With respect, it appears to me that the point taken by the appellant to the effect that action S97278 relies upon an assignment different from that which grounded action S88972, must be sustained. While the parties may be the same, the property may be the same, and the essence of the underlying agreement sought to be enforced may be the same, the two actions cannot be said to concern the same subject matter because the second action seeks to enforce a different assignment than did the first action. Had Mr. Justice Preston dismissed the first action on the basis that the agreement said to be assigned, that is the letter agreement, was unenforceable, *res judicata* would apply. However the first action was dismissed on a narrower basis, which was that the assignment of that letter agreement was not proved.

[20] The action was remitted to our Court for a trial on the outstanding issues in dispute. Although the parties attempted to have the summary dismissal application heard by Madam Justice Gerow, ultimately her schedule precluded a timely hearing date. Accordingly, this matter was scheduled before me in early April 2011.

[21] After this action was commenced, Mr. Boere met with Mr. Abbas on several occasions to try to resolve the parties' dispute. By March 2006 it was apparent that there would be no informal resolution. As of February 2006 neither Mr. Abbas nor Mr. Hanif paid the $1,800 per month required under the Purchase and Sale

Agreement. Nor did they pay the strata fees and penalties for late payments after this date.

[22] In or about January 2006 either Mr. Hanif or Mr. Abbas had sub-let Unit 109 and Unit 110 to two gentlemen who were relatives. They carried on business as Mini Dreams and sold mini motorcycles. These individuals were paying rent directly to Fleetwood Automotive Ltd. When Mr. Boere discovered that the units had been sub-let, he instructed Accurate Bailiffs and Collection Agency Ltd. to attend the premises to collect the outstanding rent and strata fees which was in total $15,812. Thereafter Mr. Boere met with the tenants and subsequently with Mr. Abbas and Mr. Hanif to resolve the unpaid rent dispute. These discussions were not fruitful.

[23] On April 4, 2006, Mr. Boere and his legal counsel met with Mr. Hanif and they made proposals with respect to the purchase of the units. These discussions did not result in any agreements either with regard to the tenants or the purchase of the units. After some additional meetings with the tenants, Mr. Boere believed an arrangement had been agreed upon with respect to the rent; however, the tenants failed to comply with his understanding of the arrangement. When the bailiffs attended the units on April 14, 2006, the premises had been abandoned and left in a state of disrepair. Because the damage to the units is the subject of Mr. Boere's counterclaim, I will not include a description of the evidence on this issue.

[24] As of mid-April 2006, Mr. Boere rented Unit 109 and Unit 110 to a new tenant who occupied the space and carried out repair work. After this date, there is no evidence that the parties had further discussions regarding the purchase of Unit 109 and Unit 110.

ISSUES

[25] The following issues arise out of the arguments of the parties:

1. Did Mr. Hanif obtain a valid assignment of the Purchase and Sale Agreement on February 16, 2006? Did Mr. Boere's words and conduct amount to an acceptance of the assignment by acquiescence?

2. If Mr. Hanif obtained a valid assignment of the Purchase and Sale Agreement, is this agreement void for uncertainty, as a result of a fundamental breach by Mr. Hanif or Mr. Abbas, or due to a failure of Mr. Hanif or Mr. Abbas to complete the sale? Did Mr. Boere acquiesce to these violations of the contract?

3. If the Purchase and Sale Agreement is enforceable, is Mr. Hanif entitled to the remedy of specific performance?

4. If the Purchase and Sale Agreement is enforceable and Mr. Hanif is not entitled to specific performance, is he entitled to damages for breach of contract?

VALIDITY OF ASSIGNMENT NO. 2

[26] The defendant argues that Assignment No. 2 is unenforceable because it fails to accurately describe the Purchase and Sale Agreement. In particular, the defendant argues the date of the purported agreement is described incorrectly and it is not clear which agreement is being assigned. The defendant also argues that the assignment was invalid without the vendor's express consent. Because the defendant is prejudiced by the assignment due to the plaintiff's continued failure to abide by the terms of the Purchase and Sale Agreement and because he has encumbered the units with a CPL for six years, consent is required to the assignment: *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*Law and Equity Act*], s. 36; Advanced Issues in Real Estate Development (2007) (CLE BC Publication) at 3.1.2; and, *Bay River Development Corp. v. Small World Holdings Ltd.* (1990), 44 B.C.L.R. (2d) 380 (C.A.).

[27] The plaintiff argues that Assignment No. 2 is valid and that the defendant's consent was not required. The plaintiff argues the Purchase and Sale Agreement is dated January 31, 2001, regardless of when it was signed by the parties. The letter agreement simply confirms the parties' agreement in writing. The plaintiff also argues that Assignment No. 2 contains the particulars necessary to identify the subject of the assignment and the document contains all the formal requirements of

s. 36 of the *Law and Equity Act*. Assignment No. 2 could not have referred to the earlier assignment because that agreement was determined to be void by Preston J. The plaintiff further argues that a contract for the sale of land can be assigned without the consent of the vendor and there is no evidence that the defendant rejected Mr. Hanif as an assignee on the ground that it would be financially prejudicial. In support of this proposition, the plaintiff relies on *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427. Lastly, the plaintiff argues that since 2003, Mr. Boere has known of the assignment and has acquiesced to its terms by his statements to Mr. Hanif and by his conduct. In particular, Mr. Boere has accepted payments under the Purchase and Sale Agreement from Mr. Hanif.

[28] A valid assignment of a contract for the purchase of land must satisfy the formal requirements of s. 36 of the *Law and Equity Act,* which are as follows:

1. The assignment must be in absolute terms.
2. The assignment must be in writing.
3. The assignment must be signed by the assignor.

[29] Assignment No. 2 satisfies all of these formal requirements; however, the defendant argues that the ambiguity with respect to the subject matter of the assignment renders it unenforceable. There are identifying terms in Assignment No. 2 that correctly describe the parties to the contract and the lands and premises forming the subject of the contract of sale. It is the date of the contract that is arguably incorrect. The defendant argues the date is a critical fact because in the first summary dismissal action Mr. Justice Preston found the contract of sale relied on by the plaintiff was not the Purchase and Sale Agreement entered into between Mr. Abbas and TJM Management Consultants Ltd. Further, because Mr. Hanif continues to believe that agreement is valid, there is no certainty that the contract assigned by Assignment No. 2 is the actual contract of sale.

[30] In my view, Assignment No. 2 is sufficiently certain to assign the Purchase and Sale Agreement to the plaintiff. Assignment No. 2 correctly identifies the parties

to the contract of sale and the lands and premises to be transferred to the purchaser. The Purchase and Sale Agreement is also dated January 31, 2001, notwithstanding it was signed by the purchaser on February 20, 2001. Mr. Hanif's statements during his examination for discovery appear to indicate that he continues to believe that the agreement attached to the first assignment was not fraudulent and reflected the terms of the sale agreement. However, the circumstances surrounding the creation of Assignment No. 2 leave no doubt that it was intended to assign the contract Mr. Boere alleged was the only agreement in existence for the sale of the units in the proceedings before Preston J. In particular, it was immediately after Mr. Justice Preston issued his judgment that Mr. Hanif secured an assignment from Mr. Abbas. Having determined that the earlier assignment was void because it did not refer to the correct purchase and sale agreement, it is highly improbable that Mr. Hanif would again attempt to secure an assignment of the wrong contract.

[31] Turning to the issue of consent, there is nothing in the Purchase and Sale Agreement that prohibits the purchaser from assigning its interest in the contract without the vendor's consent. In addition, s. 36 of the *Law and Equity Act* provides that, where the vendor is given notice of the assignment in writing, the vendor's consent is not required to render the assignment valid.

[32] There is, however, authority for the proposition that the consent of the vendor may be required where his position under the contract would be prejudiced by the assignment. There is clearly evidence of animosity between Mr. Boere and Mr. Hanif as a result of these proceedings and the earlier action, and in particular, because of the CPL registered against the units. However, there is no evidence that Mr. Boere's position under the Purchase and Sale Agreement is prejudiced by the assignment. Although the Purchase and Sale Agreement contemplates vendor financing over time, there is no evidence that Mr. Boere objected to the assignment because of Mr. Hanif's creditworthiness or that he agreed to take a mortgage back because of Mr. Abbas' creditworthiness.

[33] It is clear that Mr. Hanif takes his assignment subject to all of the equities as between the vendor and the purchaser. In addition, the assignment cannot pass any greater right or interest to the units than those possessed by Mr. Abbas at the time of the assignment. In particular, any defence to the enforcement of the Purchase and Sale Agreement that was available against Mr. Abbas, as purchaser, is equally available against Mr. Hanif, as assignee. Accordingly, I find there can be no prejudice to Mr. Boere as vendor.

[34] Lastly, the plaintiff argues that Mr. Boere consented to the assignment by his words and actions and is thus bound by acquiescence. Assignment No. 2 is only effective as of the date of express notice in writing to the vendor: s. 36 of the *Law and Equity Act.* Notice in this case was only effectively given when Mr. Hanif commenced this action and served the statement of claim on the defendant. Thus the assignment transferred the legal rights held by Mr. Abbas in the Purchase and Sale Agreement as of February 20, 2006, the date the within action was commenced in relation to Assignment No. 2. There is no evidence that after February 20, 2006 Mr. Boere acquiesced to the assignment of the Purchase and Sale Agreement to Mr. Hanif. Indeed, Mr. Boere immediately filed a statement of defence maintaining the assignment agreement was invalid and unenforceable because it was entered into without his consent.

[35] In summary, I find Assignment No. 2 is a valid and enforceable assignment of Mr. Abbas and/or Fleetwood Automotive Ltd.'s rights under the Purchase and Sale Agreement, notwithstanding the defendant refused to consent to the assignment. The assignment, however, passes no greater legal or equitable rights under the Purchase and Sale Agreement than those possessed by Mr. Abbas and/or Fleetwood Automotive Ltd. at the date notice of the assignment was given to the defendant, that is, February 20, 2006.

VALIDITY OF THE PURCHASE AND SALE AGREEMENT

[36] The defendant argues that the Purchase and Sale Agreement is not a binding agreement, but only an agreement to enter into a contract, which never occurred.

Thus there was no contract that could be assigned at law or in equity to Mr. Hanif. In support of this proposition, the plaintiff cites *Bon Street Developments Ltd. v. Shieldings Inc.*, [1995] B.C.W.L.D. 2593, 1995 CarswellBC 2772 (S.C.). In addition, the defendant argues that the Purchase and Sale Agreement is uncertain and unenforceable because it does not contain essential terms such as a completion date, the amount of monies to be paid on completion, a method to determine the monies to be paid on completion and the method of payment. In support of this proposition, the defendant relies on *Golden Properties Ltd. v. Imbrook Properties Ltd.*, [1990] B.C.J. No. 796 (S.C.), aff'd (1991), 17 R.P.R. (2d) 245 (B.C.C.A.) and *Indotan Inc. v. Invincible Resources Corp.*, 2009 BCSC 1482 [*Indotan Inc.*], aff'd 2010 BCCA 318. The defendant also argues the Purchase and Sale Agreement is unenforceable because there is a fundamental disagreement between the parties as to the interpretation of clause 1 of the agreement; that is, whether the $1,800 per month payments are to cover rent or the mortgage. Lastly, the defendant argues there is no evidence Mr. Hanif made any payments under the Purchase and Sale Agreement, thus he is not entitled to enforce the contract.

[37] The plaintiff argues that it is irrelevant who made payments pursuant to the Purchase and Sale Agreement. Mr. Hanif stepped into the shoes of the purchaser pursuant to Assignment No. 2 and by this instrument acquired all of the rights of the purchaser to enforce the contract. In addition, the plaintiff argues that Mr. Boere represented to Mr. Hanif and to Mr. Abbas that there was a valid and subsisting agreement for the sale of the warehouse units and they relied on those representations to their detriment. In particular, in response to Mr. Boere's statements that he would honour the agreement, Mr. Hanif paid the monies due and owing under the Purchase and Sale Agreement until they were paid in full. In these circumstances, the plaintiff argues the defendant is estopped from claiming the contract is unenforceable. In support of this proposition, the plaintiff relies upon *Dunn v. Vicars*, 2009 BCCA 477.

[38] The plaintiff also argues the Purchase and Sale Agreement is valid and it is not necessary that its terms be incorporated into a formal agreement to be

enforceable: s. 59(3), 59(4) and 59(7) of the *Law and Equity Act.* As long as the essential terms are in writing and signed by the parties the agreement is enforceable. Moreover, the fact that Mr. Boere accepted payments under the Purchase and Sale Agreement is further evidence of its enforceability.

[39] The plaintiff argues that the terms of the agreement are either expressly or by necessary inference found in the language of the Purchase and Sale Agreement. There is no ambiguity. The purchase price is stated to be $210,000; this is made up of the equity held by Mr. Boere as of January 31, 2001 ($76,050) and the balance owing on the mortgage as of that date ($133,950). The purchaser covenanted to pay $1,800 per month on the mortgage and property taxes and an additional $2,700 per month on the vendor's equity, $700 of which was to be credited to interest. The plaintiff maintains there is no support for Mr. Boere's evidence that the $1,800 per month was a rent payment and, in any event, any ambiguity in the document must be construed against him as the author of the document: *McClelland & Stewart Ltd. v. Mutual Life*, [1981] 2 S.C.R. 6. The purchaser would either pay out the balance of the mortgage when the equity payment was completed or he would assume the mortgage.

[40] I agree with the plaintiff's position that it is irrelevant whether it was Mr. Hanif or Mr. Abbas who paid monies to the defendant pursuant to the Purchase and Sale Agreement. There is no dispute that monies were paid under this agreement. Mr. Hanif stepped into Mr. Abbas' shoes when he took a valid assignment of the purchaser's interest in the Purchase and Sale Agreement. Mr. Hanif's standing to bring this action stems from the assignment and is not based on evidence that he paid monies to the defendant pursuant to the Purchase and Sale Agreement.

[41] Turning to the enforceability of the Purchase and Sale Agreement, s. 59 of the *Law and Equity Act* establishes the evidentiary requirements concerning proof of a contract for the sale of land as follows:

> 59
>
> ...
>
> (3) A contract respecting land or a disposition of land is not enforceable unless
>
> > (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
> >
> > (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
> >
> > (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> (4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.
>
> ...
>
> (7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

[42] The defendant does not dispute that the Purchase and Sale Agreement complies with these statutory requirements. Instead, the defendant argues the Purchase and Sale Agreement is not a binding agreement because it is merely an agreement to agree in the future on the essential terms and because the terms of the agreement are incomplete and ambiguous.

[43] The law with respect to "agreements to agree" was recently reviewed by Madam Justice Adair in *Indotan Inc.* at para. 52:

> [52] The legal principle being invoked, concerning "agreements to agree," is discussed in a number of cases. In the leading case of *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, Parker J. said at p. 288-289:
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> > It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

[44] Madam Justice Adair also reviewed the law with respect to uncertainty and ambiguity in a contract at paras. 54-57 of *Indotan Inc.*:

> [54] Further, an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all. A concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties: see *May & Butcher Ltd. v. The King*, [1934] 2 K.B. 17n (H.L.) at 20-21.
>
> [55] Moreover, as Professor Fridman writes in *The Law of Contract in Canada*, 5th ed. (Scarborough: Thomson Carswell, 2006), at pp. 21-22:
>
> > For the most part, where terms are missing or have not been finalized, or there is some ambiguity about the precise meaning of what the parties appear to have agreed to, the general tenor of the decisions is against any possibility of completing the parties' work for them and creating a valid contract out of the vague contractual intent that may be evidenced by their language or conduct.
>
> [56] In response to Invincible's argument that there was no enforceable agreement at all, Indotan cited several cases, including *First City Investments Ltd. v. Fraser Arms Hotel Ltd.* (1979), 13 B.C.L.R. 107 (C.A.), 104 D.L.R. (3d) 617, where Mr. Justice Hinkson (for the court) said, at p. 116:
>
> > It is only the lack of a term that is so essential to the contract that without it the court cannot collect the real intentions of the parties from the language within the four corners of the instrument and so cannot give effect to such intentions by supplying anything necessarily to be inferred that will render the contract unenforceable.
>
> In *Papageorgiou*, Macdonald J.A. confirmed (at p. 324) that this is equally applicable to the question whether an oral agreement has been reached.
>
> [57] The test for deciding whether a binding agreement – whether written or oral – has been made is an objective one. Even when certain fundamental terms have been accepted by both parties to a negotiation, it does not mean, necessarily, that a concluded, binding agreement has been made: see *Golden Properties Ltd. v. Imbrook Properties Ltd.* (1991), 17 R.P.R. (2d) 245 (B.C.C.A.) at 249. The initial question must be whether the parties themselves consider that a binding agreement has been made.

[45] In this case, the Purchase and Sale Agreement states that it "confirms" an agreement to purchase Unit 109 and Unit 110 for $210,000 and that the sale would be "in the form of an agreement for sale". Further, the final clause in the Purchase and Sale Agreement states, "This agreement is a temporary agreement to be replaced by a formalized agreement in the future." In my view, these statements describe the parties' intentions concerning the form a transaction, the terms of which were already agreed to, will take. Having agreed to certain terms of purchase, the

parties' expression of this transaction was to be formalized at a later date. In these circumstances, the drafting of a more formal document to record the terms of the transaction was not a condition or term of the parties' bargain.

[46] Moreover, the parties' conduct subsequent to the signing of the Purchase and Sale Agreement confirms that they believed there was a binding contract in place notwithstanding the failure to prepare any subsequent formal agreement. Mr. Abbas, or Mr. Hanif on behalf of Mr. Abbas, paid monies pursuant to the Purchase and Sale Agreement from February 2001 until August 2004 and Mr. Boere, on behalf TJM Management Consultants Ltd., accepted those payments. Section 59 subsections (3)(b) and (4) of the *Law and Equity Act* permit the court to consider acts of the parties, including the payment of monies under the contract, as evidence of their agreement.

[47] In my view, the real question is whether the Purchase and Sale Agreement contains all of the essential terms agreed upon by the parties and whether the agreement is ambiguous to the extent that the real intentions of the parties cannot be collected from "the four corners of the instrument".

[48] Addressing the ambiguity in the Purchase and Sale Agreement, the defendant argues there is a fundamental disagreement between the parties as to the payments required under the contract. While the agreement refers to the $1,800 per month as a payment on the mortgage registered against the units and for property taxes, Mr. Boere deposes that the intention of the parties was that this payment would in fact be rent. The rent paid by Mr. Abbas in 2001 was $1,800 per month and this payment was to continue unchanged. To satisfy Mr. Abbas' concern that he not be required to pay GST on the rent, the payments were to be "considered" as monthly mortgage payments by the terms of the agreement. There is no evidence from Mr. Abbas before the Court. Mr. Hanif is unable to provide evidence of the parties' intentions as he was not a party to the contract from the outset. Nor was he privy to the parties' negotiations. The plaintiff argues, however, that Mr. Boere's interpretation of the Purchase and Sale Agreement conflicts with the language of the

contract and with Mr. Boere's position that a large amount of GST is owed on the rental payments.

[49] I am unable to accept the defendant's interpretation of the Purchase and Sale Agreement. In my view, there is no ambiguity on the face of the document. Clause 1 of the Purchase and Sale Agreement clearly provides that the $1,800 per month is to cover the "existing mortgage and property taxes". In addition, the contract refers to the mortgage having a floating rate which may necessitate adjustments to the monthly payments if interest rates rise. This term would have been unnecessary if the $1,800 per month was to be a rental payment. The explanation given by Mr. Boere for notionally "naming" the rental payments as payments on the mortgage is also inconsistent with the terms of the agreement and his claims in this action. In particular, clause 1 of the Purchase and Sale Agreement says that any GST owing on these payments is the purchaser's responsibility and Mr. Boere has claimed that there is $7,812 in GST owing on the "rental payments". Thus it does not appear that Mr. Abbas in fact escaped paying GST by identifying these monies as mortgage payments. Accordingly, I find there is no ambiguity in regard to the $1,800 monthly payments.

[50] There are, however, several missing terms in the Purchase and Sale Agreement. While it is clear that the purchase price for the units was $210,000, the terms of the contract do not spell out how the purchase price is to be paid and over what period of time. During the term of the contract the purchaser is required to pay the mortgage, all of the strata fees and charges, and make payments on the vendor's equity. The contract also contemplates payments being made monthly over an extended period of time. In particular, the contract refers to post dated cheques for these payments being replaced on a yearly basis. However, the contract does not stipulate when and under what conditions title to Unit 109 and Unit 110 will be conveyed to the purchaser.

[51] The plaintiff urges the Court to infer that the intention of the parties was that when the vendor's equity as at January 31, 2001, was paid in full, title to the units

would be transferred to the purchaser upon the assumption of the balance of the existing mortgage or by the purchaser obtaining its own financing. This intention, argues the plaintiff, is clear from the fact that the 2001 equity and the 2001 mortgage balance equalled the purchase price of $210,000.

[52] I agree with the plaintiff's position that the amounts to be paid by the purchaser to satisfy the vendor's equity are easily ascertainable under the terms of the Purchase and Sale Agreement. The vendor's equity as of the date of the contract was $76,050 based on a purchase price of $210,000 and the payout statements that Mr. Boere repeatedly sent to Mr. Abbas and Mr. Hanif in 2002 and 2003 confirm a $2,000 per month reduction in the amount owing against the equity portion of the agreement from February 2001 onward. Once the purchaser paid $76,050, net of interest payments, the equity portion of the contract would have been satisfied.

[53] In addition, the terms of the Purchase and Sale Agreement adequately describe the purchaser's obligation to make the mortgage payments. The purchaser is required to pay down the mortgage and cover the property taxes owing on the units in the amount of $1,800 per month. Because the amount of the mortgage at the commencement of the contract is set out in the contract, it would take only a few simple mathematical calculations to determine the balance owing on the mortgage at any point in time. While the mortgage interest rate is not defined in the Purchase and Sale Agreement, the contract identifies the Business Development Bank as holding the mortgage and stipulates that it is the floating interest rate in this mortgage that governs the parties' contract. Thus the payout figure could be determined by reference to both the terms of the Purchase and Sale Agreement and the Business Development Bank mortgage agreement.

[54] What the parties did not direct their minds to in the terms of the Purchase and Sale Agreement was when the agreement was to complete and how the balance of the purchase price, if any, would be paid upon completion. Assuming completion was to occur when the equity was paid in full, was the purchaser to pay out the

existing mortgage based on the balance owing under the contract at any given time? Or was the purchaser to assume the existing mortgage and seek the bank's approval to do so? Yet another alternative is vendor financing of the entire purchase even after the equity was paid in full; that is, was the vendor to continue financing the purchase until the purchase price was paid in full? None of these options can be inferred from the four corners of the agreement.

[55] Although there is conflicting evidence before the Court with regard to each side's efforts to complete the sale, neither party led evidence of how this was to be accomplished or whether the parties turned their minds to this issue at any time before or after the Purchase and Sale Agreement was signed. Indeed, it appears that the parties became embroiled in a dispute about how much had been paid pursuant to the agreement and how the agreement should be interpreted before they had an opportunity to address the mechanics for completing the purchase.

[56] The question is whether the completion date and the mechanics for completing the sale are essential terms such that without them the Court cannot determine the real intentions of the parties from the agreement. Where the missing terms are not critical the Court can generally infer what is necessarily implicit in the bargain struck by the parties in order to give effect to their intentions. Where the agreement stipulates that the purchase price is due on a fixed completion date, how the purchaser obtains the funds to pay out the monies owing is unimportant. However, in the case before me, how the purchaser is to pay the purchase price is a relevant concern because the vender agreed to finance the purchase and there is no completion date in the contract. Without a completion date, the obligation of the vendor to pass title to the purchaser remains uncertain and the Court cannot infer that the parties intended title would pass on the occurrence of certain events that are not otherwise stipulated in the contract. Without a completion date, the obligation of the vendor to continue financing the purchase and for how long also remains uncertain.

[57] In my view, either a completion date or a description of the triggering events that would lead to completion of the sale and the transfer of title are essential terms missing from the agreement. In addition, there is no extrinsic evidence that would permit the Court to fill in the gaps in the contract. To do so would essentially remake the contract for the parties without any evidence of their intentions.

[58] The plaintiff argues that the defendant, in proceeding as if there was a binding contract, and making representations that he would honour the agreement despite the plaintiff's violations of its terms, creates an estoppel that precludes any argument that the agreement is unenforceable. It is apparent that for a lengthy period both parties proceeded on the basis that they had entered into a binding contract for the sale of Unit 109 and Unit 110 and Mr. Boere took no steps to terminate the Purchase and Sale Agreement before Mr. Hanif filed the first action for specific performance in October 2004. However, there is no evidence that Mr. Boere made representations to Mr. Abbas as to how or when the contract was to complete that were relied upon by Mr. Abbas to his detriment. Indeed, as described earlier, it appears that neither Mr. Boere nor Mr. Hanif directed their minds to how and when the sale would complete and the transfer of title would occur.

[59] The most troubling aspect of the plaintiff's case is that there is no evidence from Mr. Abbas that he relied on Mr. Boere's words or conduct to the effect that upon certain events or at a certain date he would transfer title to the units in compliance with the contract. By the time the contract was assigned to Mr. Hanif in late February 2006, Mr. Boere had given notice that he regarded the Purchase and Sale Agreement as terminated due to Mr. Abbas' failure to pay the amounts owing under its terms. Thus there is no evidence that Mr. Hanif relied upon any representations by Mr. Boere to his detriment after Mr. Boere was given notice of Assignment No. 2.

[60] In my view, the Purchase and Sale Agreement is void for uncertainty. The contract is missing essential terms that preclude the Court from determining the real intentions of the parties based on the language of the agreement. This is not a case

where the terms necessary to give effect to the parties' intention can be implied. The defendant is not estopped from claiming the Purchase and Sale Agreement is unenforceable.

[61] What, then, flows from a determination that the contract was void? Where a contract is declared void, it is "of no legal effect; null ... having no legal force or binding effect [or] unable in law to support the purpose for which it was intended": *Black's Law Dictionary*, Revised 4th ed., *sub verbo* "void", as cited in *Kittirath v. Doan*, 2009 BCSC 224 at para. 244. It follows that the plaintiff is not entitled to specific performance or damages for breach of contract.

[62] Whether, and to what extent, any monies paid pursuant to the void contract are recoverable by the plaintiff is linked to the claim for damages arising out of the defendant's counterclaim. Because the defendant adjourned its summary trial application on the counterclaim, and neither party has addressed in their submissions the consequences of a finding that the Purchase and Sale Agreement was void, I find it would be appropriate to deal with all of these issues at the same time.

[63] Given my finding that the Purchase and Sale Agreement is void, the plaintiff is entitled to an order setting aside the CPL registered against the title to Unit 109 and Unit 110. However, I am also satisfied that some security for the plaintiff's payments under the void contract should be ordered. Thus, provided the defendant pays into Mr. Edwards' trust account the sum of $76,050 as security for the equity payments, the plaintiff is ordered to discharge the CPL forthwith.

[64] Costs of this application will also be addressed at the subsequent hearing on the counterclaim filed by the defendant.

[65] In light of my conclusions, it is unnecessary to address the remaining arguments of the parties.

"Bruce J."